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LUKMAN HAKIM MOHAMED YOUSUF v. PP

HIGH COURT MALAYA, BUTTERWORTH
AMIRUDIN ABD RAHMAN JC
[CRIMINAL APPEAL NO: PB-42H-6-08-2021]
18 OCTOBER 2021

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Abstract – *An amended charge has to be read and explained to an accused and for the plea to be taken from him. Without reading an amended charge, it would hinder a plea on the amended charge to be taken from the accused by the court. The court would not know the plea of the accused if an amended charge itself is never read and explained. An accused has every right to know what he is facing in court.*

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Pursuant to s. 7(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958, only offensive weapons listed in the Second Schedule are deemed to be scheduled weapons. Offensive weapons not listed in the Second Schedule are not scheduled weapons. A parang, by itself, does not amount to a scheduled weapon and it only transcends to become one when (i) it is written, embossed, inscribed with or which otherwise bears any verse, word or character connected with or relating to any religion or belief; or (ii) it is normally meant to be used as a weapon and not as an agricultural implement or household or garden tool.

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CRIMINAL PROCEDURE: *Proceedings – Proper – Accused charged for being in possession of scheduled weapon – Corrosive and Explosive Substances and Offensive Weapons Act 1958, s. 7(1) – Prosecution amended charge to remove unrelated statute after accused pleaded guilty – Whether amended charge read to accused – Whether other aspects of charge remained – Whether irregularity arose – Whether there was procedural non-compliance – Whether accused prejudiced – Whether there was miscarriage of justice*

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CRIMINAL PROCEDURE: *Charge – Defective – Accused charged for being in possession of scheduled weapon – Corrosive and Explosive Substances and Offensive Weapons Act 1958 ('Act'), s. 7(1) – Charge only used word 'parang' – Whether parang by itself scheduled weapon – Whether only considered scheduled weapon when it falls within category of parang described in paras. 8 or 9 of Second Schedule of Act – Whether charge provided description or characteristics of parang as to how it appeared fit to either para. 8 or 9 of Second Schedule of Act – Whether charge defective*

H

CRIMINAL PROCEDURE: *Charge – Facts of case – Accused charged for being in possession of scheduled weapon – Corrosive and Explosive Substances and Offensive Weapons Act 1958, s. 7(1) – Whether written facts of case supported charge*

I

CRIMINAL LAW: *Offences – Possession of scheduled weapon – Accused charged for being in possession of parang – Corrosive and Explosive Substances and Offensive Weapons Act 1958, s. 7(1) – Whether proceedings proper – Whether charge defective – Whether written facts of case supported charge – Whether conviction and sentence safe – Whether retrial ought to be ordered*

The appellant was charged at the Sessions Court for being in possession of a scheduled weapon, an offence under s. 7(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 ('Act'). After the appellant pleaded guilty to the aforesaid charge, the prosecution sought an oral amendment to be made to the charge to remove the words 'Kanun Keseksaan'. The Sessions Court Judge ('SCJ') allowed the application and explained to the appellant that the sentence for the offence in question carried a minimum of five years and a maximum of ten years imprisonment. The appellant understood the sentence and maintained his plea of guilt. The case then proceeded. The facts of the case tendered during the proceedings revealed that (i) the complainant heard loud noises in the vicinity of his house made by an Indian man riding a motorcycle on the road. The next day, he heard the same loud noise coming from adjacent to his residence and saw the same man using a parang shattering the windows of a car, which belonged to his partner, parked outside. The complainant further witnessed the man disarraying the contents of the car; (ii) the appellant was arrested together with a parang said to be used to damage the windows of the car; and (iii) investigations concluded that the appellant was in possession of a parang 'without lawful authority' and had, therefore, committed an offence pursuant to s. 7(1)(a) of the Act. The SCJ accepted the plea of the appellant and made a finding of guilt on the appellant against the said charge. The appellant was convicted for the offence and sentenced to five years imprisonment. Hence, the present appeal by the appellant against the sentence. The issues that arose for adjudication were (i) whether the proceedings at the Sessions Court were improper; (ii) whether the charge was defective; and (iii) whether the written facts of the case supported the charge.

Held (quashing conviction and sentence by Sessions Court; acquitting and discharging appellant):

(1) A charge must be read to an accused and, if he pleads guilty to the charge, he is to be found guilty and convicted on the said charge which he pleaded guilty to. In this case, after the erroneous charge was read, the amended charge was never read to the appellant. Therefore, the plea of the appellant was to the former charge with the insertion of another unrelated statute and the plea of the appellant to the amended charge when all was said and done had never been taken. However, only an unrelated statute (Kanun Keseksaan), that had been inserted for no obvious reason, was removed; other aspects of the charge remained the

same. This irregularity had not caused any prejudice to the appellant or any form of miscarriage of justice had occurred because of the procedural non-compliance. The essence of the charge read to the appellant remained the same as the words 'Kanun Keseksaan' would not bring any additional meaning. The amendment was inconsequential as it did not relate to the substantive operation of the offence the accused was charged with. (paras 12 & 20)

(2) A parang by itself is not a scheduled weapon. It is only considered a scheduled weapon when it falls within the category of a parang as described in paras. 8 or 9 of the Second Schedule of the Act. The charge against the appellant had only used the word 'parang' and it failed to provide the description or characteristics of the parang as to how it appeared fit to either para. 8 or 9 of the Second Schedule of the Act. This omission caused the charge to be defective and disclosed no offence known to law. This defect amounted to a serious defect as the crux of the charge laid in the scheduled weapon in possession of the appellant. The charge had used the phrase 'tanpa kebenaran yang sah' which would acceptedly be translated as 'without lawful authority'. However, offences pursuant to s. 7(1) of the Act had no nexus with the defence of 'lawful authority' but, instead the provision states 'otherwise that for a lawful purpose'. There was a material defect when the charge failed to include the words 'without lawful purpose' and such failure had caused miscarriage of justice. (paras 28, 29, 33, 48 & 49)

(3) How did the SCJ make a finding of guilt on the appellant? The facts of the case and other exhibits tendered by the prosecution brought no indication whatsoever that it was indeed a parang that was a scheduled weapon under paras. 8 or 9 of the Second Schedule of the Act. The prosecution never brought forward and tendered the parang during the proceedings to be inspected by the SCJ and a single photograph was indistinct to determine this. The SCJ should have refused to make a finding of guilt when the prosecution had unambiguously failed to satisfy the court on this. Furthermore, an accused could not plead guilty to a charge when he admits to facts of a case which reveals a totally different story. There was no nexus between the first part, regarding the complainant seeing someone smashing the windows of the car with a parang with the second part on the arrest of the appellant with the parang. Nowhere in the facts of the case or other exhibits tendered that stated that the person who smashed the car was the appellant. Why was the part of breaking the car windows inserted in the facts of the case when it was not said to be the appellant who had done so? (paras 30, 54 & 56)

(4) A retrial should not be ordered in the circumstances of the case predominantly due to the fact that when a charge does not disclose any offence, it amounts to illegality. There was no evidence for a conviction to be made as the charge only referred to a parang and only a single photograph was tendered. (para 61)

Case(s) referred to:
Chong Chee Pak v. PP [1948] 1 LNS 94 HC ***(refd)***
Hee Nyuk Fook v. PP [1988] 1 LNS 15 SC ***(refd)***
Henry Chan Kok Loon v. PP [2017] 1 LNS 1174 CA ***(refd)***
Lee Chin Hock v. PP [1972] 1 LNS 64 FC ***(refd)***
Manokaran & Anor v. PP [1978] 1 LNS 118 HC ***(refd)***
Mathivanan Mahathevan v. PP [2018] 2 CLJ 469 HC ***(refd)***
Mee Lian Co v. PP [1961] 1 LNS 64 HC ***(refd)***
Mohammad Hassan v. PP [1997] 1 CLJ Supp 485 HC ***(refd)***
Mohd Faisa Ismail v. PP [2021] 6 CLJ 380 HC ***(refd)***
PP v. Anthony [1972] 1 LNS 108 HC ***(refd)***
PP v. Margarita B Cruz [1987] 1 LNS 129 HC ***(refd)***
PP v. Mohamed Noor Jantan [1979] 1 LNS 77 FC ***(refd)***
PP v. Muniandy [1963] 1 LNS 96 HC ***(refd)***
PP v. Sundaravelu [1966] 1 LNS 147 HC ***(refd)***
PP v. Teoh Choon Teck [1962] 1 LNS 141 HC ***(refd)***
PP v. Yeoh Siew Beng [1964] 1 LNS 153 HC ***(refd)***
PP v. Yusoff [1964] 1 LNS 155 HC ***(refd)***
R v. Ellames [1974] 138 JP 682 ***(refd)***
R v. Stone 102 ER 247 ***(refd)***
Re Abdul Latiff [1960] 1 LNS 103 HC ***(refd)***
Regina v. Jura [1954] 2 WLR 516 ***(refd)***
Sau Soo Kim v. PP [1975] 1 LNS 158 FC ***(refd)***
Seah Ah Chiew v. PP [2006] 8 CLJ 585 HC ***(refd)***
Singah Mohamed Hussin v. PP [1973] 1 LNS 139 HC ***(refd)***
Taikato v. R (1996) 139 ALR 386 ***(refd)***
Yoh Meng Heng v. PP [1969] 1 LNS 210 HC ***(refd)***

Legislation referred to:
Corrosive and Explosive Substances and Offensive Weapons Act 1958, ss. 2, 6(1), (2), (3)(a), (b), 7(1)(a), Second Schedule paras 8, 9
Courts of Judicature Act 1964, s. 35
Criminal Procedure Code, ss. 153, 158(2), 159, 305, 325, 422
Evidence Act 1950, s. 106

Crimes Act 1900 [NSW], s. 545E

For the appellant - In person
For the respondent - Nurfazliyana Ahmad; DPP

[Editor's note: Appeal from Sessions Court, Butterworth; Criminal Case No: PB-62-83-07-2021 (overruled).]

Reported by Najib Tamby

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JUDGMENT

Amirudin Abd Rahman JC:

Introduction

B **[1]** The appellant, Lukman Hakim bin Mohamed Yousuf was charged with the offence of being in possession of a scheduled weapon pursuant to s. 7(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 (Act 357) (hereinafter referred to as "Act 357") at the Butterworth Sessions Court.

C **[2]** The charge against the appellant reads as follows:

> The Charge
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> Bahawa kamu pada 13hb Julai 2021 jam lebih kurang 5.30 pagi di hadapan rumah beralamat 34 Lebuh Sungai Nyior, Butterworth di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang, telah didapati dalam
> D milikan kamu sebilah parang tanpa kebenaran yang sah. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 7(1)(a) Akta Bahan-Bahan Kakisan Dan Letupan Dan Senjata Berbahaya 1958 (Akta 357) Kanun Keseksaan dan boleh dihukum di bawah peruntukkan yang sama.

E **[3]** The appellant was unrepresented during the proceedings in the Sessions Court. Based on the notes of proceedings, the appellant pleaded guilty to the aforesaid charge on the very first instance when he was brought before the Sessions Court and the charge was read out to him. Subsequently, the learned Deputy Public Prosecutor ("DPP") sought for an oral amendment to be made to the charge to remove the words "Kanun
F Keseksaan" after the words "(Akta 357)". The learned Sessions Court Judge (hereinafter referred to as "SCJ") allowed the oral amendment. Immediately thereafter, the SCJ had explained to the appellant that the sentence which was provided for offence in question carries a minimum of five years imprisonment and a maximum of ten years imprisonment. The appellant
G understood the sentence involved and still maintained his plea of guilt.

[4] The case then proceeded with the DPP tendering the facts of the case (exh. P1) which was read out to the appellant. The appellant then admitted to the facts of the case and the DPP then adduced two additional documents which was Butterworth Police Report 4002/21 (exh. P2) and a photograph
H of the alleged dangerous weapon (exh. P3).

[5] The SCJ then accepted the plea of the appellant and made a finding of guilt on the appellant against the said charge. In mitigation, the appellant submitted that he worked as security guard and he had to tend to his four children and his wife is unemployed and thus prayed for a leniency. The
I DPP then sought for an appropriate sentence as a forethought to the

appellant. The learned SCJ then convicted the appellant and meted out a sentence of five years' imprisonment on the appellant which is to commence from the date of arrest (13 July 2021).

Facts Of The Case

[6] The facts of the case (exh. P1) that was tendered during the proceedings in the Sessions Court state that:

(i) on 12 July 2021 at about 8pm when the complainant, a civilian by the name of Lee Yen Wei was at his residence at No. 34 Lebuh Sungai Nyior, 12100 Butterworth, he heard loud noises that were made in the vicinity of his house by an Indian man riding a motorcycle on the road. Subsequently, at 5am the next day (13 July 2021), the complainant again heard the loud noise coming from adjacent to his residence. He then saw the same man was using a parang shattering the windows of a car parked outside belonging to his partner. The complainant also witnesses the man disarraying the contents of the car. Later the complainant went to the police station to lodge a police report about the incident;

(ii) consequently, the arrest on the appellant was conducted by a team of police officers from Unit Rondaan Bermotosikal of the Seberang Perai Utara Police District Headquarters on 13 July 2021 at about 5.30pm at the address of the complainant together with a parang that was said to be used to damage the windows of the car. The appellant was then brought to Seberang Perai Utara Police District Headquarters and was detained in the lock-up pending further investigation; and

(iii) the case was then investigated by Sergeant Simon Pasang and concluded that the appellant was in possession of the parang measuring 57cm without lawful authority. Hence, the appellant had committed an offence pursuant to s. 7(1)(a) Act 357 which is punishable under the same provision.

Issues In The Appeal

[7] At the outset, the notice of appeal lodged by the appellant is solely against the sentence imposed by the SCJ. Section 305 Criminal Procedure Code (hereinafter referred to as "CPC") limits the right of appeal by a person convicted on his own plea of guilt except on the limited ground of questioning the extent and legality of the sentence imposed. Be that as it may, the High Courts are bestowed with revisionary powers pursuant to s. 325 CPC and s. 35 of the Courts of Judicature Act 1964, to ensure the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceeding of the subordinate court. This court refers to the judgment of VT Singham J in *Seah Ah Chiew v. PP* [2006] 8 CLJ 585; [2007] 1 MLJ 377; [2005] MLJU 563; [2006] 3 AMR 421 where he observed that:

A I like to add that when an accused person pleads guilty it is the duty of the learned magistrate to carefully consider whether the accused fully understands the nature of the charge to which he pleads guilty. *A plea of guilty, as has been said, must be received with caution and generally the court should satisfy itself by putting questions to the accused in order to see whether he is aware of the facts on which the charge is founded against him and also whether he admits* B *his guilt voluntarily without any extraneous pressure or expectation of a lesser sentence. An accused does not plead to a section of a criminal statute. He pleads guilty or not guilty to the facts alleged in the charge which in law are said to disclose an offence under the section named in the charg*e ... It is the duty of the appellate court to see that the accused had not pleaded guilty on a misconception of law or that his conviction was not founded on such evidence which C did not or could not constitute the offence under the charge.

(emphasis added)

[8] In *Manokaran & Anor v. Public Prosecutor* [1978] 1 LNS 118; [1979] 1 MLJ 262, Abdoolcader J (as he then was) had in essence held that even when an appeal is confined only towards the sentence, it is open to the High Court D to invoke its revisionary powers when there is necessity to do so as the record of appeal has brought to the attention to the High Court on other aspects which the High Court may deliberate upon. It was stated:

E I have however not only extensive powers of revision in criminal proceedings under the provisions of section 325 of the Criminal Procedure Code but even wider powers conferred by section 35 of the Courts of Judicature Act, 1964, and the Deputy Public Prosecutor agrees that in a case like this where there is an appeal against conviction on a plea of guilty it is open to me to deal with the conviction in the exercise of my powers of revision if the circumstances of the case so warrant. *I would merely add* F *that in my view notwithstanding the provisions of section 305 of the Criminal Procedure Code an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law, in which event the conviction itself would be illegal and a nullity.*

G It is true that the matters complained of in this appeal have been brought to my notice by way of a record of appeal and the proceedings before me are headed in the criminal appeal, but, as I pointed out to counsel on both sides at the outset of this hearing, it is nevertheless open to me notwithstanding this to exercise my powers of revision in this matter, and I referred in this regard to the decision of the Privy Council in *In re Chunbidya & Ors* (1934) 62 I A 36 to the effect that *when the High Court has* H *before it on appeal a record of criminal proceedings, it can proceed to exercise its powers of revision if it chooses to do so and make the requisite order* although precluded by another provision in the Criminal Procedure Code from doing so in the appeal. (emphasis added)

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[9] This court upon perusing the records of appeal has found many aspects of the proceedings in the Sessions Court which are unsatisfactory and not in accordance with legal rules and principles. Although the appellant had pleaded guilty and the minimum sentence was imposed, the High Court is not debarred from acting on revision when justice calls for it. An appellate court never ought to turn a blind eye where the law has been compromised and the rights of a person has been jeopardised. This is one case which is as such.

[10] The court shall now address the following issues which has come to the knowledge of this court in the following sequence:

(i) the improper proceedings in the Sessions Court;

(ii) the defectiveness of the charge; and

(iii) the written facts of the case do not support the charge.

Improper Proceedings In The Sessions Court

[11] From the notes of proceedings and the records of appeal it can be seen that the charge framed against the appellant inserted the words "Kanun Keseksaan". The charge that was framed in this manner was read out to the appellant which he pleaded guilty to. It was only after this that the DPP sought for an oral amendment to be made to the charge to exclude the words "Kanun Keseksaan" and this was allowed by the learned SCJ. However, the amended charge was never read out again to the appellant.

[12] It is an axiomatic principle of law that a charge must be read to an accused and if he pleads guilty to the charge, he is to be found guilty and convicted on the said charge which he pleaded guilty to. However, in this case after the erroneous charge was read, the amended charge was never read to the appellant. Therefore, the plea of the appellant was to the former charge with the insertion of another unrelated statute and the plea of the appellant to the amended charge when all was said and done had never been taken.

[13] As it has been said time and time again, the primary reason for a charge to be framed up is to notify an accused. When a charge is amended, an accused should be well informed on what has occurred and what is the charge against him after such amendment. He should be well informed of what charges he is facing in court. Similarly, in this case as the appellant was unrepresented, it was portrayed as though the amendment of the charge only took place between the learned SCJ and the DPP and that the appellant was non-existent in the proceedings. Section 158 CPC has provided that a trial court may at any stage before pronouncing a judgment, alter or add to any charge but every such addition or alteration must be read and explained to the accused. For ease of reference, the provision of s. 158 CPC is reproduced here:

Court may alter or add to charge

158(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

[14] The subsequent provision, s. 159 CPC provides:

When trial may proceed immediately after alteration or addition

159. If a charge is framed or alteration or addition made under either section 157 or 158, the Court shall immediately call upon the accused to plead thereto and to state whether he is ready to be tried on the charge or altered or added charge. If the accused declares that he is not ready, the Court shall duly consider the reasons he may give and if proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after the charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered or added charge had been the original charge

[15] From reading both the provisions, it is clear that an amended charge has to be read and explained to the accused and for the plea to be taken from him. Without reading the amended charge, it would hinder a plea on the amended charge to be taken from the accused by the court. How would the trial court know what was the plea of the accused if the amended charge itself was never read and explained? An accused has every right to know what he is facing in court moreover in a situation where he is unrepresented. The trial court is duty-bound to ensure procedural compliance is strictly observed.

[16] In *Singah Mohamed Hussin v. PP* [1973] 1 LNS 139; [1973] 2 MLJ 109 His Lordship Syed Othman J (as he then was) instructively remarked and acknowledged that s. 158(2) CPC is mandatory in nature. The case involved an amendment to a charge that was also not read out to the accused. His Lordship Syed Othman J held that:

> Section 158(ii) is clearly a mandatory provision. Although *Govindasamy*'s case was a decision made on the omission by a trial judge to give judgment as required by section 198(i) of the Code after the assessors had given their opinion that the accused was guilty of murder, I am of the opinion that the mandatory provisions referred to by the Court of Appeal should include section 158(ii) of the Code. *Lim Tuan Hong*'s case has stood the test of time. It was decided in 1885.

[17] However, later the Supreme Court in *Hee Nyuk Fook v. PP* [1988] 1 LNS 15; [1988] 2 MLJ 360 ruled that even though the word "shall" is used in the provision, it would not necessarily connote that the procedure is mandatory in nature and it would depend on the facts and circumstances of each individual case. The Supreme Court held:

> The question that arises is whether section 158(ii) is mandatory or directory. In our view; the word "shall" appearing therein, though generally taken as mandatory, does not mean to be so in every case. No hard and fast rule can be laid down because it depends on the facts and circumstances of a particular case, the purpose and object for which such provision is made, the intention of the legislature in making the provision and the serious inconvenience or injustice which may result in treating the provision one way or the other (see *Interpretation of Statutes by Bindra*, 7th Ed., p. 662). We are of the view that the safest way is to look into the subject-matter of the case, consider the importance of the provision that has been disregarded, the relation of the provision to the object of the Code and decide in that order whether the matter is imperative or only directory (see *Howard v. Bodington* (1877) 2 PD 203 at p 211).

[18] Henceforth, the question that prevails now is whether this procedural non-compliance is curable pursuant to s. 422 CPC or otherwise, based on the facts and circumstances in this appeal. Before advancing any further, this court wishes to make it explicit that the trial court and the prosecutor should play their respective roles in ensuring that procedural requirements of the law are strictly adhered to. Procedural laws are set in place to guide the courts and litigants as to what should and should not be done during a proceeding or trial. It also serves as an instrument in criminal law to make certain that the process of the criminal justice system is not compromised in any form or manner. The Legislature does not legislate in vain and insignificantly. Section 422 CPC as an emancipator should not be abused and procedural requirements of the law are brushed off. If s. 422 CPC is said to cure every procedural irregularity and used as a safety net in every situation, there would be no necessity for the Legislature to set out procedural laws in place. As members of the judicial and legal fraternity, all of us are duty bound to pay attention and reverence of what the laws provide. Be that as it may, the position of law is clear that the court must determine whether this irregularity has caused miscarriage of justice or otherwise.

[19] In *Henry Chan Kok Loon v. PP* [2017] 1 LNS 1174; [2017] MLJU 1191, the Court of Appeal had the opportunity to deliberate on the issue whether failure to read out the amended charge and taking of plea from the accused was curable in accordance to s. 422 CPC or otherwise. The amended charge which was never read to the accused was an amendment made as to the time of the offence in the charge where it was amended from 10.15am to 10.45am. The Court of Appeal in dismissing this issue and ruled that this had amounted to an irregularity which is curable where it was held:

> [50] It has not been shown by the defence, as to how, the absence of the amended charge been read and the plea not taken, has prejudiced the Accused. Neither was it argued nor explained that the Accused was deprived of its opportunity to recall any witness which had caused a miscarriage of justice to the Accused in conducting his defence.

A [51] Hence, we are of the view that, on the totality of the evidence adduced, the:

i) failure to read the amended charge to the Accused;

ii) failure to take a plea from the Accused on the amended charge;

B by the learned trial Judge, has not occasioned a failure of justice to the Accused or that the Accused has been deprived of a fair trial which could amount to his acquittal. These are irregularities which are curable under section 422 of the Criminal Procedure Code.

[20] Having said that, looking at the entire issue, only an unrelated statute C ("Kanun Keseksaan") that had been inserted for no obvious reason and was removed. Other aspects of the charge remained the same. This court finds that this irregularity has not caused any prejudice to the appellant or any form of miscarriage of justice has occurred because of the procedural non-compliance. The essence of the charge that was read to the appellant remains D the same as the words "Kanun Keseksaan" would not bring any additional meaning. If the amendment was of substance for example that a different provision of law was made or that it had involved a different weapon, this court would rule otherwise as those matters would cause failure of justice as the substance of the charge has changed. An accused should not be assumed to know the result of the amendment and it is the duty of the court to E ascertain that the accused understands the charge and its consequences. The amendment in this case was inconsequential as it did not relate to the substantive operation of the offence the accused was charged with.

Defectiveness Of The Charge

F **[21]** In drafting a charge, the first thing that must be looked at are the provisions that create the offence and the punishment. For purposes of reference, s. 7 of Act 357 is reproduced here:

Offences relating to scheduled weapons

G 7(1) Any person who, **otherwise than for a lawful purpose**:

(a) **carries or has in his possession or under his control;**

(b) manufactures, sells or hires or offers or exposes for sale or hire; or

(c) lends or gives to any other person,

H **any scheduled weapon** shall be guilty of an offence and shall on conviction be liable to imprisonment for a term of not less than five years and not more than ten years.

(2) In any prosecution for an offence under subsection (1) the onus of proving the existence of a lawful purpose shall be upon the accused.

I (3) An offence under subsection (1) shall be deemed to be a sizeable and non-bailable offence. (emphasis added)

[22] Perusing the charge against the appellant subsequent to the amendment, the attention of this court was caught at the poor drafting of the charge which was defective. To begin with, the charge had stated "telah didapati dalam milikan kamu sebilah parang tanpa kebenaran yang sah".

[23] The charge only specified that the appellant had in his possession the parang "tanpa kebenaran yang sah" and therefore he has committed an offence under s. 7(1)(a) Act 357. One of the elements pursuant to s. 7 of Act 357 is that the weapon that is in possession of an accused must be a scheduled weapon. Act 357 provides for the definition of the term "scheduled weapon" under s. 2 as follows:

> "scheduled weapon" means any offensive weapon specified in the Second Schedule.

[24] Act 357 also provides the definition of "offensive weapon" as follows:

> "offensive weapon" includes any instrument which if used as a weapon of offence is likely to cause hurt;

[25] Hence, s. 7(1) Act 357 states that only offensive weapons that are listed in the Second Schedule are deemed to be a scheduled weapon. Offensive weapons are not listed in the Second Schedule are not scheduled weapons. This court in *Mohd Faisa Ismail v. PP* [2021] 6 CLJ 380; [2021] 10 MLJ 458 had the opportunity to discuss on the difference between these two classes of weapons in relation to Act 357 where it was held:

> [24] It is a fallacy to conclude that "offensive weapons" are bound by the Second Schedule of the Act 357. The Second Schedule relates distinctly to offences pursuant to sub-s. 7(1) of the Act 357 which are offences in regards to scheduled weapons.
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> [25] However, it is sound to say that all "scheduled weapons" as listed in the Second Schedule of the Act 357 are undoubtedly "offensive weapons" due to the very reason that the "scheduled weapons" listed if used as a weapon of offence is likely to cause hurt (referring to the definition of offensive weapons) as logic would dictate. But *vice versa*, not all "offensive weapons" are listed in the Second Schedule making it a "scheduled weapon". Therefore, the learned SCJ had misdirected herself in concluding that the "offensive weapons" are bound by the Second Schedule of the Act 357. This misdirection however in no circumstances has prejudiced the appellant in this case.
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> [26] To put this matter to rest, "offensive weapons" are not bound by the Second Schedule of the Act 357 connotating that the prosecution does not have to show that the "offensive weapon" that was in the possession or under the control of an accused was listed under the Second Schedule.

[26] The Second Schedule of Act 357 lists a vast number of offensive weapons which are deemed to be scheduled weapons. There are two paragraphs in the Second Schedule which relates to parangs and those are listed at paras. 8 and 9 as follows:

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> 8. Any sword, kris, **parang** or other knife which on any part of it is written, embossed, inscribed with or which otherwise bears any verse, word or character connected with or relating to any religion or belief.
>
> 9. Any sword or **parang** which is normally meant to be used as a weapon and not as an agricultural implement or household or garden tool.

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[27] From the portion of the Second Schedule above, it can be cognised that a parang by itself does not amount to a scheduled weapon and it only transcends to become one when it is:

(i) which on any part of it is written, embossed, inscribed with or which otherwise bears any verse, word or character connected with or relating to any religion or belief; or

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(ii) which is normally meant to be used as a weapon and not as an agricultural implement or household or garden tool.

[28] As previously stated, the charge against the appellant had only used the word "parang" and it failed to provide the description or characteristics of the parang as how it appears to fit in either para. 8 or para. 9 of the Second Schedule of Act 357. This court views that the omission to state that the parang is a parang of which characteristic relates to either para. 8 or para. 9 of the Second Schedule has caused the charge to be defective. To repeat, a parang by itself is not a scheduled weapon and that it is only considered a scheduled weapon when it falls within the category of a parang as described in paras. 8 or 9 of the Second Schedule. As an analogy, not all drugs are dangerous drugs which are listed in the Dangerous Drugs Act 1952, thus the charges in narcotic-based offences will state the name of the listed drug that is considered to be a dangerous drug.

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[29] Hence, the charge by only inserting the word parang to describe the said scheduled weapon is therefore defective and makes no offence disclosed which is known to law in the said charge against the appellant. This defect in my view does amount to a serious defect as the crux of the charge lies in the scheduled weapon in possession of the appellant. The facts of the case were of no use in aiding this matter and the photograph tendered by the DPP before the SCJ was of no indication for it to be accepted that the parang did fall under para. 8 or para. 9 of the Second Schedule. Lee Hun Hoe CJ (Borneo) in *Sau Soo Kim v. PP* [1975] 1 LNS 158; [1975] 2 MLJ 134 ruled:

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> For example, if an accused pleaded guilty to a charge which creates no offence known to law and further the facts also disclose no offence, clearly such a conviction could not be allowed to stand. Surely, such a plea of guilty to what is not an offence is no plea at all.

[30] One matter which must be brought to light was that without being satisfied that the parang was indeed a scheduled weapon that fell under para. 8 or para. 9 or even both for that matter, how did the learned SCJ make a finding of guilt on the appellant? As said earlier, the facts of the case and

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other exhibits tendered by the prosecution had brought no indication whatsoever that it was indeed a parang that was a scheduled weapon under para. 8 or para. 9 of the Second Schedule. The prosecution never brought forward and tendered the parang during the proceedings to be inspected by the SCJ and the single photograph was indistinct to determine this. The learned SCJ should have refused to make a finding of guilt when the prosecution had unambiguously failed to satisfy the court on this. This court is reminded of the words in *R v. Ellames* [1974] 138 JP 682:

> Magistrates should ensure that an accused person has a fair trial and the charge produced against him or her is determined fairly and justly and in accordance with settled procedures and law. It is the duty of a Magistrate to ensure that the poor, weak and those who cannot afford a counsel should not be victimised or denied justice in accordance to law and judicial proceedings should not be hurried in this mechanical fashion. It must be recognised that justice is a concept above one's personality irrespective of its status, position or origin.

[31] The advice given by Adams J (as he was then) in *Mee Lian Co v. PP* [1961] 1 LNS 64; [1962] 1 MLJ 131 should always be remembered that both the court and the prosecutor must play their respective roles. The prosecutor must ensure that the charge satisfies the requirements of the law and notifies an accused as to what he is facing while the court should not accept a defective charge and also is duty bound to read and explain the charge to an accused, more so if he is unrepresented by counsel. In His Lordship's judgment it was held:

> I must yet again draw the attention of Prosecuting Officers to the necessity of drafting correct charges against the correct person and also of proving to the satisfaction of the Court all the ingredients of the charge. Finally, it is the duty of the Court to see that the charge is properly drawn at the time it is read and explained to the defendant. This clearly could not have been done in this case.

[32] The learned SCJ during the proceedings should have asked to view the parang to determine whether it did fall under para. 8 or para. 9 of the Second Schedule as the photograph tendered by the DPP was of no assistance. If there were writing or inscriptions relating to religion or belief as provided under paragraphs or that it was a parang which would normally be used as a weapon and not a household or agricultural one. She should record her reasons for being satisfied with this however this was not done. To any person, the single photograph of the parang was a normal household parang. A normal household parang is not a scheduled weapon.

Lawful Authority And Lawful Purpose

[33] The predicament underlying the charge continues even more than this. This court had realised that the charge has used the phrase "tanpa kebenaran yang sah" which would acceptedly be translated as "without lawful authority". However, offences pursuant to s. 7(1) Act 357 has no nexus with the defence of "lawful authority" but instead the provision states "otherwise than for a lawful purpose" which would translate to "melainkan bagi maksud yang sah". Unlike s. 6(1) Act 357 where both lawful authority and lawful purpose is used, s. 7(1) Act 357 solely uses the term "lawful purpose".

[34] The term lawful authority and lawful purpose are two distinct terms even though there might be coinciding in certain matters. The statute is silent on the definition of both terms. In *PP v. Sundaravelu* [1966] 1 LNS 147; [1967] 1 MLJ 79, His Lordship Raja Azlan Shah J (as he was then) had in describing "lawful purpose" stated:

> Lawful purpose must here be used in the sense of purpose supported by law and to avail as a defence must relate to the actual time the weapon was found in the respondent's possession. An analogy can be drawn from the many decisions under the Emergency Regulations, 1951, notably the Court of Appeal case of *Abdul Manap v. Public Prosecutor* [1952] MLJ 140. Thirdly, the learned magistrate took the view that no dangerous situation existed at the time of the arrest and therefore came to the conclusions that there was reasonable doubt as to whether the respondent kept the knife for an unlawful purpose. That, to my mind, was a finding of fact based on speculation since the respondent had not given evidence to explain his purpose for possessing the knife.

[35] In *Public Prosecutor v. Muniand*y [1963] 1 LNS 96; [1963] 1 MLJ 147 Suffian J (as he was then) made a nexus between intention of the possession to lawful purpose or lawful authority where it was held:

> Secondly, our definition, unlike that in England, says nothing about the intention of the person who has the weapon; nevertheless intention is, in my view, relevant when considering whether or not he had lawful authority or he had it for a lawful purpose.

[36] To my mind, generally the phrase "lawful authority" would mean an authority granted by the State or one of the State's organs or by the law itself. Lawful authority as a defence would exculpate a person from being criminally responsible for an offence if the said act is permitted by the State or a law. "Lawful purpose" on the other hand would indicate that the purpose is in accordance with the law and does not involve grant of authority by the State. An accused must be able to show that the purpose that he had in his possession the weapon was not for an unlawful purpose and purpose would relate in a way to intention. The intention of possession of the weapon must be immediate and not for future use. For example, a farmer who has in his possession a scheduled weapon in a public place for example a hoe fork

while going grocery shopping cannot be said to have the weapon for lawful purpose as the intention of the weapon is for him to perform his farming work at his farm. When it leaves this context, the lawful purpose ends and bringing it out in public on a daily errand would not make it for a lawful purpose.

[37] Having said that, in relation to the word "lawful authority" in Act 357, I do not find any provision which allows for an offensive weapon to be granted with lawful authority for example provision by way of licensing. There is also no provision that allows the subsidiary legislations to be made pursuant to Act 357 with respect to licensing for carrying and/or to be in possession of such scheduled weapon. Therefore, this court is of the opinion that in the context of Act 357, "lawful authority" may be only allowed as an absolute defence if it falls within the ambits of s. 6(3) Act 357 (presumption) which states that:

> (3) A weapon shall be presumed to be carried with lawful authority if it is carried:
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> (a) by a member of the armed forces of Malaysia or of any local force or of the police force or of any visiting force lawfully present in Malaysia under any taw relating to visiting forces, or a person in the service of any Government or local authority in Malaysia, and in any such case is carried in or in connection with the performance of his duty as such member or person; or
>
> (b) by any person as part of his official or ceremonial dress on any official or ceremonial occasion.

[38] If a person falls into one of the classes of person mentioned in para. 6(3)(a) Act 357 and that the offensive weapon is carried or in connection with the performance of his duty as such member of such person. This means that it would be understandable that a policeman would have or carry a baton when he is on duty as it is carried in the performance of his duty and such item is of a type which is normally issued to him for the purpose of discharging his duty. However, the same cannot apply when a policeman being member of the police force in civilian clothes found in possession of a dagger in a marketplace when he is not on duty. Such action cannot fall into the category of having in his possession of the dagger in lawful authority as it has no connection with him performing his duties as a police officer. Meaning to say those persons mentioned in s. 6(3)(a) Act 357 are only presumed to have a "lawful authority" to be in possession of an offensive weapon if it is carried in or in connection with the performance of his duty (refer *PP v. Yeoh Siew Beng* [1964] 1 LNS 153; [1965] 1 MLJ 119).

[39] The subsequent para. 6(3)(b) of Act 357 allows the presumption of "lawful authority" to be used by any person if the offensive weapon is part of his official or ceremonial dress on any official or ceremonial occasion.

A This is for example during a Malay wedding where the bridegroom's keris is part of the bridegroom's ceremonial attire. This would raise the presumption of the defence of the lawful authority. Therefore, to put in briefly a person can only be said to have "lawful authority" of having in his possession or under his control of offensive weapon when it falls within the B ambit of either s. 6(3)(a) or 6(3)(b) of Act 357 and no other scenario.

[40] This would be the rationale on why the words "lawful purpose" are of pivotal importance to be inserted in charges pursuant to s. 7(1) Act 357 as it is well-known that the primary reason of a charge is to notify an accused as to what is the offence that he is said to have committed. When the words C "lawful purpose" is not inserted in the charge, an accused would not know that if he had in his possession the scheduled weapon with a lawful purpose, he could indicate it to the court, where it would render his plea qualified and unaccepted or even he will refuse to plead guilty at all.

[41] Goddard CJ in his judgment in *Regina v. Jura* [1954] 2 WLR 516, had D deliberated on the offence of carrying of an offensive weapon without lawful authority or reasonable excuse in a public place. His Lordship made an observation that there was a distinction between carrying of an offensive weapon and use of the offensive weapon. It was held:

> E The appellant was not carrying this rifle without lawful authority because he was at a shooting gallery where for the payment of a few pence people can amuse themselves by firing at a target. He was carrying the rifle for that purpose, and he had an obvious excuse for carrying it. It was his use of the rifle which was unlawful, and for which he might have been convicted of a felony. If a person having a rifle in his hand for a lawful F purpose suddenly uses the rifle for an unlawful purpose, the Offences against the Person Act, 1861, provides appropriate punishment.

[42] The judgment of the Australian High Court in *Taikato v. R* (1996) 139 ALR 386, in my view would bring some indication on what "lawful purpose" can be concluded at. In this case, the accused was charged for G carrying a pressurised canister of formaldehyde in accordance with s. 545E of the Crimes Act 1900 (NSW). The accused was convicted by the Magistrate's Court and she appealed against the said decision. The issue before the High Court was whether the accused, who was carrying a pressurised canister of formaldehyde to defend herself if she happened to be attacked, had a reasonable excuse for possessing it or possessed it for a lawful H purpose within the meaning of the Crimes Act 1900 (NSW) as a person cannot be found guilty for the offence if the person satisfies the court that he had a reasonable excuse for possessing it or possessed it for a lawful purpose. The panel of the Australian High Court had different interpretations as to what amounted "lawful purpose" since it was not defined by the said Act. I The relevant passage from the judgment is reproduced below relating to the interpretation of lawful purpose:

Brennan CJ, Toohey, McHugh and Gummow JJ:

If "lawful purpose" in s. 353B required the purpose to be authorised by law, any person who innocently had a packet of razor blades on him or her when arrested would be guilty of an offence against the section unless that person could point to a law that positively authorised the carrying of the razor blades. Such an interpretation of s. 353B does not advance the purpose of the section and is so harsh and unreasonable that it must be rejected.

Kirby J:

What meaning should be given to the phrase "lawful purpose", when used in this context? The word lawful" can mean, simply, permitted, i.e something which can be done without an infraction of the law, for example a lawful trade. Or it can mean something which is supported by the law, for example lawful authority. Or again it may connote a quality of being legally enforceable, for example a lawful demand which can be enforced by action. In many cases it is easier to see what the word does not mean than to define with precision what it does.

In such contexts, the better view of the meaning of "for a lawful purpose" in subs (2) is that it refers to a purpose expressly or impliedly authorised by law. If it meant simply some purpose that was not made unlawful by another provision of the law, it would be difficult to reconcile such a very broad exception with the explicit statement of the offence in s. 545E(1). As in the case of the possession of loaded firearms (for which s. 93G(3) provides a parallel exception), there are clear cases where a person may have the thing in question in a public place "for a lawful purpose", in the sense of being positively authorised by law. Thus, police may be so authorised. Others who have explosive fuses, detonators and canisters of teargas may be able to demonstrate the positive authority of law for such possession.

The "lawful purpose" which is referred to relates to the "possession" of the object, not to its potential future use.

[43] Hence, by failing to state that the possession of the parang was without lawful purpose, it failed to notify the appellant that he could speak up if it was true that he did have a lawful purpose for having the parang. As decided in *PP v. Teoh Choon Teck* [1962] 1 LNS 141; [1963] MLJ 34 where Hepworth J (as he was then) ruled:

If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may.

[44] Later in *Yoh Meng Heng v. PP* [1969] 1 LNS 210, Ong Hock Sim J had ruled that an accused had the right to know the particulars of a charge against him so that he may rebut it. His Lordship held:

> In my view, it is essential that a person accused of a charge should be given sufficient particulars to know just what the charge against him is, so that he may rebut it. It is embarrassing to the defence not to know just what he is alleged to have contravened.

[45] As mentioned earlier, with the omission of inserting "without lawful purpose" in the charge, it had deprived the appellant from knowing that it only amounted to an offence if he had possessed the parang without lawful purpose and if he did have lawful purpose he should say so. For example, if a gardener is charged for having in his possession cutters used to cut branches in the middle of a public garden, when a charge omits the word "without lawful purpose" it would not give the said gardener a notice that it only amounted to an offence if he possessed the cutters without a lawful purpose, as he would very well have had lawful purpose for possessing the item.

[46] In *PP v. Yusoff* [1964] 1 LNS 155; [1964] 1 MLJ 264 a situation worth noting occurred where the Magistrate was informed in court by the accused that the keris had been borrowed from him by a friend for a marriage ceremony. Hashim J ruled that it amounted to a qualified plea as the keris was indeed with lawful purpose, the Magistrate should not have accepted his plea and should have proceeded with the hearing of the case and allowed the accused to prove the lawful purpose of carrying such keris. His Lordship ruled:

> In my opinion the accused in this case made a qualified plea of guilty and the magistrate should not have accepted his plea. He should have proceeded with the hearing of the case and allowed the accused to prove the lawful purpose of carrying a keris. In my opinion it was lawful for the accused to carry his keris home if he had lent it to a friend for use in a marriage ceremony. It is a well-known fact that the keris forms part of the bridegroom's regalia at a "bersanding" ceremony.

[47] Another incident that occurred was in the case of *Re Abdul Latiff* [1960] 1 LNS 103; [1960] 1 MLJ 198, where the Magistrate did not explain to the accused that it would only be an offence if the weapon is possessed for unlawful purposes. Adams J ruled:

> Had the Magistrate explained the charge and what constituted the offence to the accused he would obviously have pleaded not guilty because he had the dagger in possession for a lawful purpose namely because he was moving his belongings from Kuala Lumpur to Kuala Selangor in a perfectly legitimate manner and the law does not make the mere possession of a dagger an offence *per se*.

[48] Thus, this court is of the view that there was a material defect when a charge under s. 7(1) Act 357 fails to include the words "without lawful purpose" as there might have been a possibility that if an accused is

informed, he might have defended himself by stating his lawful purpose which if he did plead guilty would still be an unacceptable as it amounted to a qualified plea or even refuse to plead guilty at all.

[49] For the aforesaid reasons, it is certain that the failure in inserting the words "lawful purpose" in the charge has caused miscarriage of justice. In *PP v. Mohamed Noor Jantan* [1979] 1 LNS 77; [1979] 2 MLJ 80 the respondent was tried before the Sessions Court, Kuala Lumpur on the following charge:

> That you on June 25, 1974 at about 2.50 p.m. at No. 16, Hale Road, in the City of Kuala Lumpur, did have in your possession an offensive weapon, *to wit* a 'Kerambit' knife otherwise than with lawful authority, and that you have thereby committed an offence punishable under section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance No. 43/58.

[50] Wan Suleiman FJ ruled that the charge was defective as the words "for lawful purpose" was not specified in the charge. His Lordship ruled:

> It should be noted here that the words "or for a lawful purpose" which appears in section 6(1) of the Ordinance was omitted, though any charge under that subsection which left out these words would be defective. However, both the notes taken by the learned President and his grounds showed that neither defence counsel nor the learned President had failed to note the omission, and indeed the defence was that the possession of this offensive weapon was for a lawful purpose.

[51] In the upshot, "lawful authority" and "lawful purpose" are defences available to an accused facing a charge under s. 6 or s. 7 of Act 357. Section 6 Act 357 allows for both defences to be available to an accused and the burden of proving lawful authority and lawful purpose is on the accused as it is a 'defence'. Despite s. 6(2) Act 357 states that the onus of proving the existence of a "lawful purpose" shall lie upon the accused and the words "lawful authority" is not mentioned whereby presumption of "lawful authority" only arises in the subsequent subsection, to my mind nevertheless the use of the defence of "lawful authority" and the presumptions under s. 6(3) Act 357, the onus is also on an accused. As this court has ruled in *Mohd Faisa Ismail v. PP* (*supra*) both lawful purpose and lawful authority are to be proved by the accused. The reason is because despite s. 6(2) Act 357 which only uses the term "lawful purpose" but "lawful authority" is also a defence and whether or not a person has lawful authority it is a fact specifically within the knowledge of that person and this is in line with s. 106 Evidence Act 1950 which states:

Burden of proving fact especially within knowledge

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

ILLUSTRATIONS

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

[52] Thus, this is why this court is of the opinion that "lawful authority" is also a defence that must be proved by an accused by utilising the presumptions pursuant to s. 6(3) Act 357. It would be impossible for the prosecution to prove without lawful authority as the scope of the presumption under s. 6(3) is extremely extensive and far-reaching (see *R v. Stone* 102 ER 247). This court finds support from the decision of *Lee Chin Hock v. PP* [1972] 1 LNS 64; [1972] 2 MLJ 30 where the Federal Court ruled:

> This is peculiarly within the knowledge of the person charged and section 106 of the Evidence Ordinance earlier referred to clearly applies. Three cases need only be mentioned to show that the question had already been resolved in our courts. They are:
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> 1) *Busu v. Public Prosecutor* [1948-49] MLJ Supp 140 CA – a case under regulation 4(1) of the Emergency Regulations, 1948;
>
> Willan CJ said there were three ways for a person not of the class or category mentioned in regulation 4(2) to escape liability, namely, to show (a) he had a licence, or (b) he was an authorised person or (c) an exempted person. He went on to say:
>
> > If, therefore, it is necessary for the prosecution to call *prima facie* evidence that an accused had no licence, equally it must be necessary for them to call *prima facie* evidence regarding (b) and (c) above.
>
> For the prosecution to adduce *prima facie* evidence regarding (a), (b) and (c) above would place an onus on them of giving negative proof regarding lack of qualifications, when in fact the existence of those qualifications is especially within the knowledge of the accused.
>
> 2) *Abdul Manap v. Public Prosecutor* [1952] MLJ 140 CA – it was held that it is not an essential part of the case for the prosecution to prove the absence of lawful authority [call it "excuse" in the instant case] and that the onus of the negative averment was on the accused to prove he had lawful authority. Spenser Wilkinson J delivering the judgment of the court quoted with approval a passage from the judgment of Talbot J in *Williams v. Russell* 141 LTR 190 at p 191:

... Where it is an offence to do an act without lawful authority, the person who sets up lawful authority must prove it and the prosecution need not prove the absence of lawful authority.

3) *Public Prosecutor v. Lim Kwai Thean* [1959] MLJ 179 at p 180 – a case under the Emergency (Registration Areas) Regulations, 1948 involving onus to establish whether person is or is not required to be registered. We quote this time from Good J. acting in revision:

> At the trial, Mr. Yeo, counsel for the accused, submitted that the onus lay upon the prosecution to establish affirmatively that the accused was a person required to be registered under the Regulations and submitted that as no such proof had been given by the prosecution, there was no case for the accused to answer. The learned Magistrate accepted that submission and acquitted the accused without calling upon him for his defence ... There is only one point in these proceedings, and that is the point which was the subject matter of Mr. Yeo's submission at the trial. The question is: Where does the onus of proof lie in order to establish that a person is, or is not, as the case may be, a person required to be registered under these Regulations? ... Does the onus lie upon the prosecution to prove that any particular person who fails or refuses to produce an identity card on demand by a Police Officer is not a member of one of the excepted categories, or does the onus lie upon the person concerned to prove that he is an excepted person? In my opinion, the effect of section 106 of the Evidence Ordinance is quite clear: 'When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him,' and then follows the very well-known illustration (b) – the railway ticket illustration. To interpret that section properly, I think it is essential to concentrate upon what was meant by the word 'especially'. It does not say "'exclusively,' or 'solely,' within the knowledge of any person." And, as I see it, the effect of the word 'especially' is this: That if it is an easy matter for the person concerned to prove a fact the proof of which by the prosecution would present the prosecution with inordinate difficulties, then ordinary common sense demands that the balance of convenience should be in favour of the prosecution.

It would appear that all these three decisions were based on the application of section 106 of the Evidence Ordinance.

Here the appellant was accused of an offence of having in his possession prohibited documents without lawful excuse. If he had a lawful excuse, that fact would be especially within his knowledge. Section 106 in the clearest language provides that the burden of proving that fact is on the appellant. It follows therefore that it is not for the prosecution to prove the absence of lawful excuse.

[53] In *Public Prosecutor v. Muniandy* (*supra*), Suffian J had deliberated and decided on this very point as well where His Lordship was of the opinion:

> Whether or not the second accused committed an offence in having it depends on the further question whether or not he had lawful authority or he carried it for a lawful purpose. By virtue of s. 106 of the Evidence Ordinance it is for him to prove that he had lawful authority and by virtue of sub-section (2) of s. 6 of Ordinance No. 43 of 1958 it is also for him to prove that he carried it for a lawful purpose.

Facts Of The Case Do Not Support The Charge

[54] Facts of a case, whether oral or written must support the charge and be in line with the charge itself. An accused cannot plead guilty to a charge when he admits to facts of a case which reveal totally a different story. First and foremost, that upon perusing the facts of the case, this court fails to see the nexus of the first part regarding the complainant seeing someone smashing the windows of the car with a parang at 5.30am with the second part on the arrest of the appellant with the parang at 5.30pm. Nowhere in the facts of the case or other exhibits tendered during the trial that it was stated that the person who smashed the car 12 hours prior was said to be the appellant. Apart from that, the charge stated that the appellant was found in his possession a parang at 5.30am but the facts of the case stated that the accused was found with the parang and arrested by the police only at 5.30pm. This court finds this rather perplexing as to how was the charge stated that the appellant was found in possession of the parang at 5.30am when the police had only arrested him being in possession of the parang somewhat 12 hours later at 5.30pm? This would be illogical for the court to accept the plea of the appellant and admission to the facts of the case when both are in contradiction of each other.

[55] In *Mohammad Hassan v. Public Prosecutor* [1997] 1 CLJ Supp 485, the High Court ruled that facts of a case ought to be limited to facts which the prosecution is able to prove and only then to facts which are required to establish the charge. It was held:

> The facts presented to the Court after a plea of guilty should be a short summary of the facts of the case.
>
> The length of the narrative will depend on the nature of the charge and seriousness of the case.
>
> It is not required to be some kind of litany in which the wording of the section of the Act under which the accused has been charged should be faithfully reproduced.
>
> It should be confined to facts which the prosecution is able to prove and then only to facts necessary to establish the charge (see *Chen Chong & Ors. v. PP* [1967] 2 MLJ 130 HC; *Abdul Kadir bin Abdul Rahman v. PP* [1984] 1 MLJ 80 HC; *Lian Kian Boon v. PP* [1990] 2 CLJ 799; [1991] 1 MLJ 51

HC). In simple and straightforward case the outline of the facts is usually done orally but in more involved cases the outline may be in the form of a written statement (see *Mok Swee Kok v. PP* [1994] 3 SLR 140 CA). But in cases of doubt or difficulty it may be advisable to have evidence led as to the facts.

[56] This court does not see why the part for the breaking of the car windows was inserted in the facts of the case when it was not said to be the appellant who had done so. But as this court has stated earlier, what is even more baffling is regarding the disparity between the time stated in the charge which is a requirement pursuant to s. 153 CPC in comparison to the time in the facts of the case. At this instance, the learned SCJ should not have made a finding of guilt and convicted the appellant when this was presented before the trial court.

[57] In *Public Prosecutor v. Margarita B Cruz* [1987] 1 LNS 129, KC Vohrah J ruled:

Then again, when the prosecuting officer gives the facts relating to the charge implicating the accused where the accused has pleaded guilty, the magistrate should be vigilant to see that the facts make out the ingredients relating to the charge and where the accused states facts which show that one or more of the essential ingredients have not been made out, then notwithstanding the plea of guilty, the magistrate should reject the plea and fix a date for evidence to be adduced at a trial.

[58] In *Mathivanan Mahathevan v. Public Prosecutor* [2018] 2 CLJ 469 a similar incident as in this case occurred where there were contradictions as to the time between the charge and facts of the case. The High Court ruled:

[26] When the facts of case (P1) is examined, it is clear that they do not support the charge under s. 4 of the Act as framed in the amended charge. There are glaring contradictions between the charge and the facts of case. The charge stipulates that the time and place of offence is:

... 15/09/2015 jam lebih kurang 10.30 malam di tepi Lebuh AMJ berhampiran dengan hentian rehat dan rawatan Rembia, Alor Gajah, dalam Daerah Alor Gajah di dalam Negeri Melaka ...

Whereas, the facts of case (P1) states the date, time and place of the alleged offence as:

Pada 28/1/2016 jam lebih kurang 7.00 pagi, semasa penama, Saravanan a/l Jayaram, sedang tidur di KM 670, Jalan Hospital Lama, Alor Gajah, ... tertuduh telah kembali... sekitar jam 12.00 tengahari ...

Clearly, the facts of case are in relation to the charge under s. 436 of the Penal Code (Arrest Case No: 62-01-02-2016) which reads as follows:

A Bahawa kamu pada 28.01.2016 antara jam 1200 tengahari hingga 1230 tengahari semasa di rumah KM 682, Jatan Hospital Lama, 78000 Alor Gajah, Melaka telah mendatangkan kemusnahan terhadap harta benda milik Sivabalan a/l Karunakaran No. KPT: 910729075801, dengan cara membaling bahan terbakar iaitu Molotov Koktaii ke arah rumah, oleh yang demikian kamu telah
B melakukan kesalahan di bawah seksyen 436 Kanun Keseksaan dan dihukum di bawah seksyen yang sama.

[27] In fact the entirety of the facts of case (P1) refers to the charge under s. 436 of the Penal Code (Arrest Case No: 62-01-02-2016) and is absolutely unconnected to the charge under s. 4 of the Act (Arrest Case
C No: 62-02-02-2016). In the circumstances, the learned Sessions Judge ought to have rejected the plea of guilty and proceed to set the matter down for trial so that evidence may be adduced.

[59] Thus, the learned SCJ should have been vigilant of this contradiction and rejected the plea of guilt. It is beyond comprehension to allow such a
D conviction made to be upheld. Sharma J in *PP v. Anthony* [1972] 1 LNS 108; [1972] 1 MLJ 229 where His Lordship stated:

I need not repeat what I have already said on several occasions that it is the duty of the magistrates to exercise a good deal of care in accepting a plea of guilty. Again, no facts seem to have been recorded by the learned
E magistrate. It may and does sometimes become dangerous to convict an accused merely on his plea of guilty without recording any facts and this case is illustrative of the danger inherent in that practice. If the learned magistrate had taken the precaution to ask for facts and a copy of the order referred to in the charge was produced it would with ease have become plain and apparent that there in fact existed no such order as was
F referred to in the charge. I regret the liberty of a subject has by the lack of ordinary and requisite care expected of the courts in every case been imperilled and unnecessarily interfered with. I may also take this opportunity to say that the prosecution itself should exercise a lot more care and vigilance in framing a charge against an accused. The object of a charge is to give notice to the accused of the essential facts constituting
G the offence which he is alleged to have committed and the law he has violated. The charge should be capable of being substantiated with as much evidence as is available to the prosecution. It is not enough merely to say that some offence has been committed by the accused. He is required to answer a specific charge and meet the specific allegations in the charge and pointedly plead thereto alone.

H

Whether There Should Be A Retrial

[60] As this court has made it clear that the charge was indeed defective and had caused miscarriage of justice and the contradictions between the charge and the facts of the case had made the plea of guilt incapable making a
I conviction to stand.

[61] The question which arose was whether a retrial should be ordered in such circumstances. The answer of this court is in the negative predominantly due to the fact that when a charge does not disclose any offence it amounts to an illegality. The charge which only refers to a parang and from the single photograph of the parang tendered (the parang was never tendered during the proceedings before the SCJ) there is no evidence for a conviction to be made. Unlike drug cases where most drugs have the same resemblance, there would be a chemist report to satisfy the court on the type of drug that was found in the possession of an accused, scheduled weapons that are listed do not need expert opinions to assist the courts. The test of practicality and reasonableness should be applied meaning to say any reasonable person who sees the weapon would be able to identify the weapon as a scheduled weapon as the characteristics of the scheduled weapon is already provided for each and every scheduled weapon in the Second Schedule. From the sole photograph tendered, there is nothing to show that the parang indeed fulfilled the characteristics stated in para. 8 or para. 9 of the Second Schedule. To any person, the photograph was one of a parang which any ordinary person uses for household or farming purposes. I would quote the words of Callow J in *Chong Chee Pak v. PP* [1948] 1 LNS 94 where His Lordship stated "re-trial of a nullity is an impossibility" as in this appeal there is no such offence in law of a parang by itself being a scheduled weapon making the conviction a nullity. No retrial is justified in such a scenario.

Decision

[62] Hence, this court in the interest of justice has no hesitance in exercising the revisionary powers of the High Court in this instance due to the aforementioned reasons. The conviction and sentence by the Butterworth Sessions Court is quashed and the appellant is acquitted and discharged.